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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE DETROIT BANK, FORMERLY THE DETROIT SAVINGS BANK, A MICHIGAN BANKING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court (R. 229–243) is reported in 41 F. Supp. 41. The opinion of the United States Circuit Court of Appeals (R. 292–296) is reported in 127 F. (2d) 64.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 8, 1942 (R. 290). The petition for a writ of certiorari was filed on June 17,

1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Government's lien for federal estate taxes, although unrecorded, is superior to the lien of a mortgagee who acquired the mortgage in good faith and without knowledge of the lien. This depends upon whether the lien for federal estate taxes provided under Section 315 (a) of the Revenue Act of 1926 is subject to the provisions of Section 3186 of the Revised Statutes, as amended.

2. Whether Section 315 (a) of the Revenue Act of 1926 as applied to the facts of this case violates the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The statutes involved may be found in the Appendix, *infra,* pp. 10–12.

STATEMENT

The facts, as stipulated (R. 100–130–f), and as found by the District Court (R. 229–240), may be summarized as follows:

John P. Paul, a resident of Detroit, Michigan, died on May 5, 1926 (R. 229). At the time of his death the decedent and his wife, as tenants by the entirety, owned certain real estate (R. 230–231).

In July 1927, the decedent's widow filed a federal estate tax return and paid the tax shown on the

return (R. 229). In March 1930, the Commissioner of Internal Revenue notified the widow of the determination of a proposed deficiency in federal estate taxes in the amount of about $23,000 (R. 229–230). In May 1930, the widow filed a petition for redetermination of the deficiency with the United States Board of Tax Appeals. In November 1932, the Board of Tax Appeals entered an order in that proceeding approving the Commissioner's determination of the deficiency, from which no appeal was taken. On February 19, 1933, the Commissioner of Internal Revenue duly assessed against the estate of the decedent a deficiency in federal estate taxes in the principal amount of about $23,000, together with interest of about $8,000. No part of this deficiency has ever been paid (R. 230).

Some of the real property in the decedent's estate was mortgaged by the widow or by her children, who succeeded her in title, to the Detroit Bank, petitioner herein (R. 235–238). There was a default in the payment of the obligations secured by the mortgages; the petitioner foreclosed the mortgages and bid the property in at foreclosure sale (R. 235–236).

On May 4, 1936, the United States instituted this action to foreclose its lien upon the various parcels of real estate held by the decedent and his wife, as tenants by the entirety, at the time of his death, for the unpaid federal estate taxes and in-

terest (R. 1–47). The petitioner, as mortgagee, was joined among others as party defendant (R. 1). The District Court determined that the lien of the United States for the unpaid federal estate taxes and interest was superior to the liens represented by the mortgages, including those of petitioner, which were executed subsequent to the date of the death of the decedent (R. 241). Accordingly, the District Court ordered the sale of all parcels of real estate except those mortgaged prior to the date of the death of the decedent (R. 247–256). From this order the petitioner, together with other parties defendant, appealed to the Court below which affirmed the decision of the District Court.

ARGUMENT

1. Petitioner relies upon Section 3186 of the Revised Statutes (Appendix, *infra,* pp. 10–11) which deals with tax liens generally and which requires the Government's lien to be recorded in order to be valid against a mortgagee, etc. The court below, however, correctly held that Section 315 (a) of the Revenue Act of 1926 (Appendix, *infra,* p. 12), which deals specifically with liens for federal estate taxes, is independent of Section 3186; and since the provisions of Section 315 (a) do not require recordation, the Government's lien for estate taxes herein took priority over subsequent mortgage liens which were recorded without notice of the Government's lien. The same conclusion has been reached

in *United States* v. *Security-First Nat. Bank,* 30 F. Supp. 113 (S. D. Cal.), and *United States* v. *McGuire,* 42 F. Supp. 337 (N. J.),[1] and there is no conflict of decisions.

Section 315 (a) of the Revenue Act of 1926 had its genesis in Section 209 of the Revenue Act of 1916, c. 463, 39 Stat. 756, the first federal estate tax law. It provides that unless the tax (the federal estate tax) is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent. The only lien to which the statute refers is one for federal estate taxes. On the other hand, Section 3186 of the Revised Statutes deals with liens generally. The court below based its decision (R. 295) upon the familiar rule of statutory construction that special provisions will prevail over general ones. *Missouri* v. *Ross,* 299 U. S. 72, 76; *Baltimore Nat. Bank* v. *Tax Comm'n,* 297 U. S. 209, 215; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *New York Life Ins. Co.* v. *Bowers,* 283 U. S. 242, 246–247; *Kepner* v. *United States,* 195 U. S. 100, 125; *McKee* v. *United States,* 164 U. S. 287, 294; *United States* v. *Chase,* 135 U. S. 255, 260; *Townsend* v. *Little,* 109 U. S. 504, 512.

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[1] Apparently no appeal was taken in the *Security-First Nat. Bank* case. Shepherd's Citations show that the appeal was dismissed at 113 F. (2d) 491, but that citation is erroneous because it relates to a different case. Our records show that no appeal was taken. Judgment has not yet been entered in the *McGuire* case so that the time within which to take an appeal has not expired.

Section 3186, Revised Statutes, was originally enacted in 1866, fifty years before the first federal estate tax, and there was obviously no Congressional intent to make it applicable to estate taxes. Moreover, its language is inappropriate to federal estate taxes. As amended, it reads in part as follows:

> That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: * * *

The statute refers to taxes due from a living person because under its terms the lien does not arise until the person liable to pay the tax refuses to pay upon demand. The lien under Section 3186 does not arise until the assessment list is received by the Collector; whereas the law is clear that a lien for federal estate taxes arises on the death of the decedent. *Rosenberg* v. *McLaughlin,* 66 F. (2d) 271 (C. C. A. 9th); *United States* v. *Security-First Nat. Bank, supra; United States* v. *Cruikshank,* 48 F. (2d) 352 (S. D. N. Y.); *United States* v. *Ayer,* 12 F. (2d) 194 (C. C. A. 1st).

The difficulties of protecting the Government's lien for estate taxes, if it must be recorded, are exemplified by the facts of this case. The decedent

died on May 5, 1926. His widow filed a federal estate tax return on July 5, 1927 (R. 229). On March 14, 1930, the Commissioner of Internal Revenue notified the decedent's widow of the determination of a proposed deficiency in federal estate taxes in the sum of about $23,000 (R. 229–230). An appeal was taken from the notice of deficiency by the widow to the United States Board of Tax Appeals on May 10, 1930 (R. 230). Under Section 308 (a) of the Revenue Act of 1926 the Commissioner was precluded from making an assessment until the decision of the Board of Tax Appeals became final which was about February 19, 1933. On the latter date an assessment was made for a deficiency of about $23,000 and for interest of about $8,000 (R. 103).

Therefore, under Section 3186 no lien would have arisen until the assessment list was sent to the Collector which would have been subsequent to February 19, 1933, almost seven years after the decedent died. In the meantime purchasers, mortgagees, or judgment creditors may have acquired rights which, under Section 3186, would prevail over the United States because the lien did not arise and could not be recorded prior to that time. This construction of Section 3186 would not only jeopardize the claim of the United States for many years, but it would also conflict with those decisions which hold that the lien for estate taxes arises at the time of death.

It may be pointed out further that the scope of the two sections, with respect to the property covered, is not the same. Section 3186 provides that "the amount shall be a lien * * * upon *all* property and rights to property belonging to such person." [Italics supplied.] Section 315 (a), on the other hand, divests part of the estate of the lien and provides that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration allowed by any court of competent jurisdiction shall be relieved of the lien.

The fact that Congress enacted a special provision in regard to liens for federal estate taxes, which differs from the general provision in regard to liens, is not unusual. Section 2800 of the Internal Revenue Code (U. S. C., Title 26, Sec. 2800) provides that the tax on distilled spirits shall be a lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the land on which the distillery is located and on any building thereon from the time the spirits are in existence as such until the tax is paid. No court has held that the lien for taxes on distilled spirits must be recorded in order to be valid against bona fide purchasers or mortgagees without notice. Cf. *Blacklock* v. *United States,* 208 U. S. 75.

2. The petitioner also argues that if Section 315 (a) is construed as imposing a lien which is effective against bona fide purchasers and mortgagees without the necessity of recording the lien, it vio-

lates the Fifth Amendment to the Constitution (Br. 39–49). The contention is without substance. This Court has already sustained an unrecorded federal tax lien even where local law required recording. *United States* v. *Snyder,* 149 U. S. 210. In any event the statute is not arbitrary or capricious; when petitioner acquired the various mortgages after decedent's death it should have been put on notice of his connection with the property and of the fact that the property was of a class to which a lien could attach for federal estate taxes. The dilemma of a lender who has made a loan upon such property without satisfying himself that the taxes have been paid can hardly render the reasonable provisions of the statute arbitrary or capricious. Cf. *Fox v. Seal,* 22 Wall. 424, 438–439.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

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JULY, 1942.

APPENDIX

Revised Statutes, as amended by the Act of February 26, 1925, c. 344, 43 Stat. 994:

SEC. 3186. That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: *Provided further,* That whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that State, and in the State of Louisiana in the parishes thereof, and in the States of Connecticut, Rhode Island, and Vermont in the office of the registrar or recorder of deeds or town or city clerk having custody of the land records of the towns and cities, then such lien shall not be valid in that State against any mortgagee, purchaser, or judgment creditor until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, or in the office of the registrar or recorder of deeds or town or

city clerk having custody of the land records in the States of Connecticut, Rhode Island, and Vermont of the towns or cities within which the property subject to the lien is situated.[1]

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *

* * * * *

SEC. 313. * * *

(b) If the executor makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Com-

[1] The above represents the provisions of Section 3186 as they stood when the decedent died. They were subsequently amended by Section 613 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and by Section 509 of the Revenue Act of 1934, c. 277, 48 Stat. 680; and as finally amended, they were incorporated in Sections 3670–3677 of the Internal Revenue Code. None of the subsequent changes appear to affect this case.

missioner (as soon as possible, and in any event within one year after the making of such application, or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 310) shall notify the executor of the amount of the tax. The executor, upon payment of the amount of which he is notified, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

(c) The provisions of subdivision (b) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless the title to such part of the gross estate has passed to a bona fide purchaser for value, in which case such part shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, or distributees.

* * * * *

SEC. 315. (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

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